INSOLVENCY MANUAL.

AN

INSOLVENCY MANUAL

CONTAINING THE ARTICLES OF THE

CODE OF CIVIL PROCEDURE

RELATING TO

ABANDONMENT OF PROPERTY, CAPIAS AD RESPONDENDUM, ATTACHMENTS BEFORE JUDGMENT, AND REVENDICATION

TOGETHER WITH

NOTES UPON CONSERVATORY ATTACHMENT,

COMPILED AND COLLATED WITH THE

MOST RECENT AMENDMENTS

AND THE

LATEST DECISIONS OF THE COURTS.

BY

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PREFACE.

The Quebec Statute, 48 Victoria, chapter 22 (1885), introduced important amendments to the law of insolvency. These amendments, it may be fairly said, greatly facilitated the winding up of insolvent estates, and proved of corresponding value to the mercantile community generally.

Important decisions have been pronounced by the courts in connection with these amendments, and it has been the compiler's object to collate them with the text of the law.

The provisions as to capias are so intimately connected with the law as to abandonment of property, that they have also been incorporated. This has seemed all the more desirable as the law in capias matters has also been amended, so that its meaning and object are now well defined.

The Client, for whom, as well as for the practising Advocate, this work has been compiled, has frequently enquired: Of what practical utility is the law of capias, and what may a creditor expect from its operation against a secreting or absconding debtor, or one who refuses to make an assignment? Briefly, it may be said in answer: that under the law as now

framed, the writ of capias, if maintained, ultimately compels the debtor to abandon all his property, for the common benefit of his creditors, unless he prefer to spend one year or less, in durance vile. It also ensures, his imprisonment for a like period (in the discretion of the court or judge,) should he be found guilty of any fraudulent secretion or concealment, in the abandonment of his property.

The important subjects of Revendication and Conservatory attachments so frequently invoked in cases of insolvency, are also presented, although having, of course, a wider range.

Curators, Merchants, and Advocates, will all, it is hoped, find this book of service.

R. S. W.

No. 186 St. James Street.
Montreal, 18th October 1889.

REFERENCES.

L. C. J.—Lower Canada Jurist.

M. L. R.—Montreal Law Reports.

Q. L. R.—Quebec Law Reports.

L. N.—Legal News.

R. L.—Revue Légale.

SUP. CT. CAN.—Supreme Court of Canada.

Q. B.—Court of Queen's Bench.

S. C. R.—Superior Court sitting in Review.

S. C.—Superior Court.

Erratum.

At page 39, line 8, read "justify" for "satisfy."
" " " " 10, read "satisfy" for "justify."

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AN

INSOLVENCY MANUAL.

ABANDONMENT OF PROPERTY,

AS CONTAINED IN THE

CODE OF CIVIL PROCEDURE.

763. Any debtor, arrested under a writ of *capias ad respondendum*, and every trader [1] who has ceased his payments, [2] may make a judicial abandonment of his property for the benefit of his creditors.

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(1) Sec. 1 of the Insolvent Act of 1875 contains the following comprehensive list of those who may be recognized as traders.

"The following persons and partnerships, and unincorporated companies exercising like trades, callings or employments, shall be held to be traders within the meaning of this Act:

"Apothecaries, auctioneers, bankers, brokers, brickmakers, builders, carpenters, carriers, cattle or sheep salesmen, coach proprietors, dyers, fullers, keepers of inns, taverns, hotels, saloons or coffee houses, lime burners, livery stable keepers, market gardeners, millers, miners, packers, printers, quarrymen, sharebrokers, shipowners, shipwrights, stockbrokers, stock jobbers, victualers, warehousemen, wharfingers, persons insuring ships or their freights or other matters against perils of the sea, persons using the trade of merchandise by way of bartaining exchange, bartering, commission, consignment, or otherwise, in gross or by retail, and persons who, either for themselves or as agents or factors for others, seek their living by buying or selling, or buying or letting for hire goods or commodities, or by the workmanship or the conversion of goods or commodities, or trees; but a farmer, grazier, common laborer, or workman for hire, shall not be deemed a trader within the meaning of this Act."

NOTE.—Vide article 797 et seq. infra, for provisions respecting *capias*.

(2) Civil Code.—Art. 17, sec. 23. — "By bankruptcy (*faillite*) is "meant the condition of a trader who has discontinued his pay-"ments."

In the absence of *capias*, no abandonment can be made, if the debtor has not been so required as hereinafter provided.[1]

Decisions.—1. That a blacksmith who himself supplies the iron which he uses, is a trader.

That inability on the part of a trader to pay a particular debt, is not of itself an indication of insolvency, which only exists according to article 17 of the Civil Code, when he has ceased his payments in general.—*Sirois* v. *Beaulieu* 13 Q. L. R. 293, S. C. R. 1887.

2. Judicial abandonment under Art. 763 C. C. P. 48 Vict. Ch. 22 (Q) does not apply to the liquidation of a succession belonging to minors; and therefore, an assignment made by a tutrix, of the property of insolvent minors at the request of a creditor, is illegal, and will be set aside.—*Tourville* v. *Dufresne* 3 M. L. R. 288, S. C. 1887.

3. Que l'acte 48 Vic. ch. 22, passé par la législature de Québec, n'est pas *ultra vires*; et la cession de biens et leur distribution, que cet acte autorise, ainsi que l'émanation du *capias ad respondendum* qu'il permet, sont compris dans les sujets sur lesquels "The British North America Act 1867" l'autorise à législater.—*Parent* v. *Trudel*, 13 Q. L. R. 136, S. C. R. 1887.

4. On petition of the defendant, cause being shown, he would be permitted, even five months after judgment to file the statement of affairs required by C. S. L. C. cap. 87, sec. 12 and that plaintiff's petition for imprisonment would be dismissed in consequence of such permission.—*Henderson v. Lemieux*, 17, L. C. R. 414; 1876.

5. The mere fyling of the statements in conformity with Art. 764, does not entitle the party arrested to be released from custody, such statement being subject to attack by any creditor.—*Brucker* v. *Moher*, 21 L. C. J. 26 S. C.; 1876.

6. A debtor, arrested under a *capias*, who makes abandonment of his property, is not entitled to be liberated at once in consequence of such abandonment, but is

(1) Vide appendice Form A.

obliged to wait the expiration of the delays provided in articles 773 and 774 of the Code of Civil Procedure, for the contestation of the statement filed by him.

Such a debtor has a right to maintenance, even though it be established that he has not refunded to his creditor a sum exceeding fifty dollars, which he had secreted.—*Ogilvie* v. *Farnan*, 17 R. L. 471. S. C. 1889.

7. Que la saisie et vente des biens apparents d'un débiteur par un de ses créanciers n'empêche pas la demande de cession de ses biens.—*Parent* v. *Trudel*, S. C. R. 13 Q. L. R. 136, 10 L. N. 217.

8. Bien que la cession volontaire de biens par un débiteur à ses créanciers, ne dépouille pas le débiteur de la propriété de ses biens, elle constitue néanmoins en faveur des créanciers un mandat irrévocable qui a pour effet, de priver le débiteur du droit de disposer autrement, de ce qu'il a ainsi cédé.—*Jacob* v. *Jacob*, 2 M. L. R. : 258 S. C. 1886.

Note.—Vide arts. 773 and 776 *infra*, penalty for omission of debtor to mention property of the value of $80.

783*a.* Every trader who has ceased his payments, may be required to make such abandonment, by a creditor whose claim is unsecured for a sum of two hundred dollars and upwards. [1]

Civil Code, art. 1092.—" The debtor cannot claim he " benefit of the term when he has become a bankrupt " or insolvent, or has by his own act diminished the " security given to his creditor by the contract."

Decisions :—1. A promissory note *à terme* in case of insolvency is immediately exigible.—*Lovell* v. *Meikle*, 2 L. C. J., 69, S. C. R. 1853.

2. Que l'insolvabilité du débiteur lui fait perdre le bénéfice du terme convenu.—*Furniss* v. *Bleault*, 2 M. L. R. 419, S. C. 1886.

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(1) Vide Form A

3. Inability on the part of a trader, to pay a particular debt, is not of itself an indication of insolvency.—*Sirois* v. *Beaulieu*, 13 Q. L. R. 293, S. C. R. 1887.

4. Que la cession de biens demandée à un commerçant qui a cessé ses paiements doit l'être par le créancier lui-même ou par un mandataire spécial, qui doit communiquer au débiteur l'acte ou écrit constitutif de ce mandat.

Que l'allégation qu'une cession de biens, qui a été demandée par un mandataire sans production de son mandat à cet effet, a été légalement faite, interdit au débiteur celle de l'informalité et de l'irrégularité de la demande.

Que la cession de biens faite par une société doit être consentie par chacun de ses membres et doit comprendre, non-seulement les biens de la société, mais aussi les biens particuliers des associés.—*Reid* v. *Bisset*, 15 Q. L. R., S. C. R. 1889.

5. Que le débiteur insolvable perd le bénéfice du terme, même vis-à-vis des créanciers privilégiés, qui peuvent, après son insolvabilité, procéder, contre lui, avant l'échéance de ce terme.—*Beaudry v. Kelley* 17 R. L. 370 S. C. 1889. (25 Demolombe No. 665).

764. This abandonment is effected by filing a statement, sworn to by the defendant, and making known :

1. All the moveable and immoveable property of which he is possessed ;

2. The names, and addresses of his creditors, the amount of their respective claims, and the nature of each claim, whether privileged, hypothecary, or otherwise.

Such statement must be accompanied with a declaration by the debtor, that he consents to abandon all his property to his creditors.

The abandonment, is made in the office of the prothonotary of the Superior Court of the district wherein the *capias* issued, and in the absence of *capias*, of the district of the place where the

debtor has his principal place of business, and, in default of such place, of the place of his domicile. [1]

765. The debtor, must give notice of the abandonment by inserting an advertisement to that effect in the Quebec Official Gazette, and by a registered notice sent by mail to the address of each of his creditors. [2]

The notice addressed to the creditors must contain a list of the creditors of the debtor, mentioning the amount due to each.

In default of such notices being given by the debtor, any creditor may give them himself.

766. A debtor who has been admitted to bail, is bound to file this statement and declaration, within thirty days from the date of the judgment rendered in the suit in which he was arrested. (*Vide art.* 776 *infra, penalty in cases of default to comply herewith.*)

Any person, condemned to pay a sum exceeding eighty dollars, exclusive of interest from service of process and costs, for a debt of a commercial nature, is likewise, after such moveable and immoveable property as he appears possessed of, have been discussed, bound, upon being required to do so, to file a similar statement. [3]

Decisions :—1. Qu'un défendeur arrêté sur *capias*, est sujet à l'emprisonnement décrété par l'article 776 C. C. P. pour n'avoir pas produit son bilan et sa déclaration, dans les trente jours du jugement.—***Bellerive*** v ***Taylor et al.***, 15 R. L. 582, S. C. 1887.

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1. See form B.
2. See forms C. & D.
3. See form D.

2. Where a debtor had been condemned to six months imprisonment, for contempt of Court in making a false *bilan*, and it was shown that he has been in prison for two months and that his health was imperilled, the Court in its exercise of discretion, ordered his discharge.—*Wulff & Elliott*, No. 1025 S. C. 1888, Taschereau J.

767. If the debtor is in gaol, he may file such statement and declaration at any time.

768. Immediately after the filing of the statement, the prothonotary appoints a provisional guardian, whom he as far as possible, selects from among the most interested creditors who, either personally or by a person whom he delegates for that purpose, takes immediate possession of all the property liable to seizure, and the books of account of the debtor.

The guardian may summarily dispose of any perishable goods, and may take conservatory measures under the direction of the judge, or, in the absence of the latter, of the prothonotary.

The abandonment being made, the court or the judge upon demand of a party interested, must appoint, upon the advice of the creditors of the debtor, a curator to the property of such debtor.

Inspectors or advisers may also in the same manner be appointed at this, or any subsequent meeting.

The meeting shall be convened within a short delay,[1] and in the manner in which the court or judge deems suitable.[2]

The record of the proceedings upon the abandonment, is then transmitted to the prothonotary of the Superior Court of the district in which the debtor has his place of business.

1. The usual delay is eight clear days. See Form E.
2. See form F.

Decisions.—1. The provisional guardian, appointed to property judicially abandoned, must be resident within the Province of Quebec.

The decision of the prothonotary appointing a provisional guardian, may be revised by the court or judge.

Where the interests of the provisional guardian appointed by the prothonotary, are adverse to those of the creditors generally, his appointment may be set aside.—*McDougall* v. *McDougall et al* and *Munro*, Davidson J.; July 15, 1887, 3 M. L. R. ; S. C. 148.

2. Although articles 763 *et seq.* use the expression "a curator" there is nothing in the law to exclude a joint curatorship, composed of two or more persons.

The appointment of a curator, is with the court or judge, and not with the creditors; but creditors attending the meeting will be heard, and their suggestions as to the appointment, will be considered by the court.—*Beaudet & Chinic;* S. C. 1887, Stuart C. J.; 13 Q. L. R., 265 ; 10 L. N. 396.

3. The Court of Appeals will not interfere with the discretion exercised by a judge of the Superior Court in the appointment of a Curator. *David & Fisher & Dion*, Q. B. September 1889.

769. After the abandonment, any proceeding by way of attachment, attachment for rent, or attachment in execution against the moveables of the debtor is suspended ; and the guardian or the curator has a right to take possession of the goods seized, upon serving by a bailiff, a notice [1] of his appointment, upon the seizing creditor, or upon his advocate, or the bailiff entrusted with the writ.

The costs upon such attachment, made after the notice, or, in the absence of such notice, incurred by a creditor after he had knowledge of the abandonment, either personally or by his advocate or by the bailiff, and, in all cases, the costs of attachment made eight days after the

1. See form G.

notice given by the debtor or the curator, cannot be collocated upon the property of the debtor, the proceeds whereof are distributed in consequence of the abandonment.

Decisions.—**1.** Que malgré la cession de biens et la nomination d'un curateur, le créancier peut, en vertu de son jugement, faire saisir et vendre par bref de biens l'immeuble cédé par son débiteur dans sa cession de biens.—*St. Jorre* v. *Morin*, 10 L. N. 14, Cimon J. 1886.

2. Que rien n'empêche un créancier de prendre un jugement contre son débiteur, quand même celui-ci serait sous l'effet d'une loi de faillite, et n'aurait pas encore obtenu sa décharge; et un plaidoyer à l'encontre de l'action du créancier ne contenant que l'allégation de cet état de faillite, sera rejeté sur réponse en droit.—*The Canadian Mutual Fire Ins. Co.* v. *Blanchard*, 2. M. L. R. 61, S. C. 1886.

3. That the provisions of art. 769 do not nullify any attachment, *saise gagerie*, or execution, but simply constitute a protection to the creditors generally as to costs, and the court can permit the continuance of any such proceeding instituted, according to circumstances.

And *held* also that where an abandonment had been made by the defendant, but no provisional guardian appointed, the plaintiff would be allowed to proceed with an attachment after judgment in the hand of third parties.—*Thompson et al.* v. *Kennedy & Allan et al*, 16 R. L. 522. S. C. 1888

770. The curator is bound to make his appointment known, by an advertisement in the Quebec Official Gazette, and by a registered notice, transmitted by mail, to the address of each creditor. [1]

In such notice, the curator shall call upon the creditors to file their claims with him, within a delay of thirty days. [2]

1. See form H.

2. See form K.

Note.—No formalities are expressly required for the fyling of creditors claims, but the analogous article 604 C. C. P. probably applies :

" 604. The claims may be made out in a summary " manner, and it is sufficient for them to state the names, " occupation, and residence of the claimant and the " nature and amount of his claim.

" They must be accompanied with vouchers if there " are any, or if not, with affidavit that the sum claimed " is lawfully due."

Decisions.—**1.** That where the creditor held certain promissory notes received by him from the debtor as collateral security, he was not entitled to be collocated for the amount of his claim, without deducting sums received by him on account of the notes, since the fyling of his claim.—*Thibaudeau & Benning*, 17 R.L. 173. Q. B. 1889. A creditor is not obliged to value his security. *Ibid.*

2. The holder of negotiable paper, the maker and endorser of which are insolvent, who receives a dividend from the estate of one of them, cannot claim on the estate of the other for the full amount of his claim, but should on the contrary, deduct the amount of the first dividend when he fyles his claim on the estate of the second ; but if after having fyled his claim, he receives a dividend from the estate of one of the parties bound towards him, he has nevertheless the right to be collocated for the full amount of his claim as fyled, provided these dividends do not exceed the balance due him.—*Rochette St. Louis and Migner*, Meredith J. 3 Q. L. R. 97. S. C. 1877,

3. That a creditor has not the right to be collocated for the full amount of his claim, on the goods of those bound jointly and severally towards him, without deducting what he has received from them, before fyling his claim.—*Exchange Bank of Canada, in liquidation and Archibald Campbell et al and Ontario Bank and Chaplin* 17 R. L. 246, Q. B. 1889.

770*a.* The curator appointed may be required to give security, the amount whereof is fixed by the court or judge ; and he is subject to the summary jurisdiction of the court or judge.

Such security may be given in favor of the creditors or the debtor generally, without mentioning their names.

Civil Code. art. 2272.—" Curators are subject to imprisonment for whatever is due by reason of their administration, to those whom they represent."

771. The curator takes possession of all the property mentioned in the statement, and administers it, until it is sold in the manner hereinafter mentioned.

772. The curator has likewise a right to receive, collect and recover any other property belonging to the debtor, and which the latter has failed to include in his statement.

The curator may, with the permission of the court or judge, upon the advice of the creditors or inspectors, exercise all the rights of action of the debtor and all the actions possessed by the mass of the creditors.

Decisions.—1. B. and C. of Quebec, ordered goods from R. and al. of Wolverhampton, England, who shipped them by defendants steamer *Vancouver*, from Liverpool to Quebec consigned to B. and C. and a bill of lading in the usual form was accepted and forwarded for them. On the 20th June 1887 before the arrival of the goods, B. and C. having become insolvent made an abandonment of their property, and intervenants were appointed joint curator to the estate. On July 25th the goods were seized by R. and al. in the possession of the defendants under writ of *saisie revendication*.

Art. 6 C. C. does not apply to prevent the exercise of the right of stoppage *in transitu* in the case of goods shipped in England, when the right accrues under the law of England.

The "delivery" mentioned in art 1543 of the C. C. as amended by 48 Vic. ch. 20 sec. 1, means *actual* delivery into the possession of the purchaser, and not

such constructive delivery as results from putting goods for shipment in the hands of a carrier.—*Rogers and al.* v. *The Mississipi and Dominion S. Co. & Rattray*, 14 Q. L. R. 99. S. C. 1888.

2. The curator to the property, abandoned by insolvent trader, has the right to revendicate goods removed without his consent, from his custody, without previously taking the advice of the creditors, and being judicially authorized. —*Kent and al.* v. *Ross and al.*, 16 R. L. 209.

3. Where a person notoriously insolvent, transfers a policy, of life insurance to a creditor as collateral security for a pre-existing debt, and the amount of the insurance is received by such creditor after the death of the assignor, any other creditor may bring action in his own name against such assignee, to set aside the assignment and to compel him to pay the money into Court for distribution among the creditors generally.—*Prentice and Steele* 4 M. L. R. 319; S. C. 1888.

Semble : That under Art. 772 the curator could take such an action for the benefit of the creditors generally.

The curator may sell the debts and moveables and immoveables of the debtor, in the manner indicated by the court or judge, upon the advice of the parties interested, or the inspectors.

Decisions.—1. That a curator to a judicial abandonment who sells without reserve the book debts of the debtor, and who on payment of the price, delivers the books themselves to the purchaser, cannot afterwards revendicate them, if he only proves that the creditors of the debtor have an interest in obtaining possession of the books.—*Kent and al.* v. *Granger*, 17 R. L. 63, S. C. 1889.

2. That the sale of book debts of a trader in insolvency, does not include the books of account themselves, but simply the sale of the claims of the insolvent.—*Guindon* v. *Fatt*, 3 M. L. R. 79 S. C. R. 1887.

Upon the demand of the curator authorized by the creditors or by the inspectors, or upon

the demand of an hypothecary creditor, of which demand sufficient notice must be given to the debtor, the court or judge may authorize the curator or command him to issue his warrant [1] addressed to the sheriff of the district where the immoveables of the debtor are situated, requiring him to seize and sell such immoveables.

Decisions.—1. Que les créanciers de l'insolvable peuvent seuls attaquer l'hypothèque acquise pendant son insolvabilité notoire, et que le tiers détenteur ne peut pas opposer ce moyen.—*Pacaud et Brisson* 12 Q. L. R. 281. S. C. R. 1886.

2. The registration of a hypothec within thirty days of the insolvency of the person granting it, is without effect. Such claim should be collocated as an un-privileged claim. *Dwyer & Fabre & McCarron*, 24 L. C. J. 174, S. C. 1879.

3. Que celui qui a obtenu du failli, longtemps avant la faillite, un bon titre à un immeuble, mais qui n'a pas enregistrer son titre avant la faillite, peut cependant empêcher la vente du dit immeuble par le syndic, et obtenir distraction de cet immeuble. *Grothe* v. *Stewart* 12 R. L., 218 S. C. 1882.

4. Qu'une obligation d'hypothèque consentie par un débiteur à son créancier, moins d'un mois avant la mise en faillite du premier, est nulle.

Que ce créancier est présumé avoir connu l'insolvabilité de son débiteur si, trente jours après avoir obtenu telle obligation, il a produit une déposition à l'effet de faire émaner un bref de saisie contre les biens de ce débiteur, qu'il accuserait d'insolvabilité notoire.

Que la collocation de tel créancier sur les biens de son débiteur, basée sur l'obligation en question, sera rejetée sur contestation par tout autre créancier du failli, et alors, il sera fait une nouvelle distribution du montant de cette collocation.—*La Banque d'Hochelaga v. Union Bank*, 12 Q. L. R. 377. Q. B. 1886.

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1. See from I.

Civil Code, art. 2023.—"Hypothec cannot be acquired, "to the prejudice of existing creditors, upon the immove- "ables of persons notoriously insolvent, or of traders, "within the thirty days previous to their bankruptcy."

The sheriff executes such warrant, without making any service upon the debtor, but by otherwise observing the same formalities as in the case of a writ *de terris ;* and all proceedings subsequent to the issue of the warrant, up to the distribution of the moneys arising from the sale, are had in the Superior Court.

The distribution of such moneys must be made by the curator in accordance with the provisions of article 772*a*.

772*a*. The moneys realized by the curator from the property of the debtor, must be distributed among the creditors by means of dividend sheets, prepared after the expiration of the delays to file creditors' claims, and are payable fifteen days after notice [1] is given of the preparation of such dividend sheets.

Such notice is given, by the insertion of an advertisement in the Quebec Official Gazette, and by a registered notice, sent by mail, to the address of each of the creditors of the debtor, who have filed their claims, or who appear upon the list of creditors furnished by him.

The claims or dividends may be contested by any party interested.

The contestation for such purpose, is filed with the curator, who is bound to transmit it immediately to the prothonotary of the Superior Court of the district in which the proceedings upon the abandonment are then deposited,

1. See form J.

or to such other district as the parties interested in the contestation may agree upon, and such contestation is proceeded upon and decided, in a summary manner.

Decisions.—1. The 48th Vic. ch. 22 does not affect the common law as to the right of creditor to claim against the estate of a joint debtor *en déconfiture.*

Under the common law of this province, a creditor claiming against the estate of a joint debtor is entitled to take a dividend on his claim, only after deduction therefrom of whatever he may have received from his other joint debtor.

Money due by the creditor at the time the claim is made, is to be set off against the claim and not against the dividend to be declared upon it.—*In re Chinic and al. and Bank of B. N. A. and Rattray* 14 *Q. L. R.* 265. S. C. 1888.

2. That the curator who neglects to transmit immediately to the prothonotary a contestation of a claim as required by C. C. P. 772 *a*, will be condemned to pay the costs incurred by his default, on petition of the claimant asking for payment of his dividend, even although the curator has previously given claimant verbal notice that a contestation had been filed.—*Fauteux, Kent, Turcotte and Marchand,* 17 R. L. 256. S. C. 1889.

3. The lessor who has issued a *saisie-gagerie,* is entitled to be paid out of the proceeds of the effects garnishing the leased premises, by preference to the costs of the curator appointed to the judicial abandonment made by the lessee subsequentto the seizure, with the exception of the costs incurred for the safekeeping and sale of the effects.—*De Bellefeuille & Desmarteau,* 3 M. L. R.; 303 Q. B.; 1887.

4. The privilege of the lessor for his rent has priority over that of the curator to a judicial abandonment except for costs incurred in the interest of the lessor.—*In re Menard,* 2 M. L. R.; 130 S. C. 1886.

5. Que sur la contestation du mémoire de frais du curateur, a une cession de biens, faite sous les dis-

positions des articles 763 et suivants C. P. C. les frais de procureurs du contestant doivent être taxés, conformément aux articles 51 à 55 inclusivement du tarif des avocats de la cour supérieure.—*Bouthillier & Desmarteau* et *Letourneux*, 16 R. L. 48. S. C. 1886.

6. Qu'une obligation d'hypothèqne consentie par un débiteur à son créancier, moins d'un mois avant la mise en faillite du premier est nulle.

Que ce créancier est présumé avoir connu l'insolvabilité de son débiteur si, trente jours après avoir obtenu telle obligation il a produit une déposition à l'effet de faire émaner un bref de saisie contre les biens de ce débiteur qu'il accuserait d'insolvabilité notoire.

Que la collocation de tel créancier sur les biens de son débiteur, basée sur l'obligation en question, sera rejétée sur contestation par tout autre créancier du failli, et alors, il sera fait une nouvelle distribution du montant de cette collocation.—*La Banque d'Hochelaga v. Union Bank*, 12 Q. L. R. 377. Q. B. 1886.

7. The privilege of a commercial traveller for wages, under C. C. 2006 which was maintained by Superior Court, not determined by Court of Queen's Bench, but doubted.—*Heyneman and Harris.* M. L. R. 2 Q. B. 466.

8. There can be no compensation of a debt due to an abandoned estate, at the time of the abandonment, by an unprivileged claim for unearned wages.—*Chinic and Lefebvre and Rattray* 14 Q. L. R. 167. S. C.; 1888.

Civil Code, art. 2005.—(as amended.) "The privilege of the lessor extends to all rent that is due or to become due, under a lease in authentic form.

"But in the case of the liquidation of property abandoned by an insolvent trader who has made an abandonment in favour of his creditors, the lessor's privilege "is restricted to the whole of the rent due and to become due during the current year, if there remain "more than four months to complete the year; and if "there remain less than four months to complete the "year, to the whole of the rent due and to the rent "becoming due during the current year and the whole "of the following year.

" If the lease be not in authentic form, the privilege " can only be claimed for three overdue instalments and " for the remainder of the current year."

Note.—For privileged claims upon moveable property see Civil Code art. 1994 et seq; upon immoveables 2009 et seq.

773. Any creditor may contest the statement, by reason :

1. Of the omission to mention property of the value of eighty dollars ;

2. Of any secreting by the debtor within the year immediately preceding the institution of the suit, or since, of any portion of his property, with intent to defraud his creditors ;

3. Of fraudulent misrepresentations in the statement, with respect to the number of his creditors or the nature or amount of their claims.

In cases where the debtor has given notice of the abandonment of his property to his creditors as above prescribed, the delay to contest the statement is restricted, as to the creditors to whom the notice is sent, to four months from the date of sending such notice.

Decisions.—1. Fraudulent preference by which assets which should be available for the creditors generally, are given to one or more, is equivalent to secretion :—*Gault v. Dussault* 4 L. N. 321, Q. B. 1881.

2. La préférence donnée par un débiteur insolvable à un de ses créanciers, constitue un recel et expose ce débiteur au *capias*.—*MacKinnon v. Keroack* 15 R. L. 34 Q. B. 1887. Confirmed by Supreme Court of Canada.

3. Le transport fait, par un débiteur insolvable, de tout son actif, à un de ses créanciers, dans le but de lui donner une préférence sur les autres, constitue la soustraction de ses biens, avec l'intention de frauder, justifiant

l'émanation d'un *capias*.—*Nash* v. *Beuthner*, 16 R. L. 699, S. C. R. 1889.

Civil Code, article 1036.—" Every payment by an in-" solvent debtor to a creditor knowing his insolvency, is " deemed to be made with intent to defraud, and the " creditor may be compelled to restore the amount or " thing received or the value thereof, for the benefit of " the creditors according to their respective rights."

774. The contesting party is bound, within the same delay, to prove his allegations by all legal means. The court may, however, prolong the delay for making such proof, but not beyond two months.

Decisions.—Le délai de quatre mois accordé par les articles 773 et 774 C. P. C. pour contester le bilan d'un débiteur qui a fait cession de biens, et faire la preuve des allégations de la contestation, ne peut être prolongé de deux mois sous l'article 774, qu'avant l'expiration du délai de quatre mois et que cette prolongation ne peut avoir lieu après l'expiration du premier délai.—*Woodward vs. McKenzie & Woodward* 17 P. L. 700 S. C. 1889 ; *Rev. Stat. Can.* Ch. 9, S. 32, 33 et 64 ; *Purcell & Kennedy* 14 Sup. Ct. Can. 453 ; *Chanteloup vs. Dominion Oil Co.* 2 L. N. 314 S. C. 1879.

775. The debtor is bound to attend before the court or before a judge, under the penalty hereinafter imposed, in order to answer all questions which may be put to him concerning such statement.

Decision.—The debtor is bound to attend before the court or judge, on the demand of any creditor, and the creditor has a right to examine the debtor concerning his sworn statement, even although the creditor has not fyled any contestation of such statement : *Friedman & Parker*, S. C., 1887.—Mathieu, J.

776. If the contesting party establishes any one of the offences mentioned in article 773, or

if the debtor refuses to attend or to answer as required under the preceding article, the court or judge may condemn him to be imprisoned for a term not exceeding one year.

If the debtor so ordered to be imprisoned, does not surrender himself, or is not surrendered for that purpose according to such order, then, the sureties are liable to pay the plaintiff the debt, together with interest and all costs.

If the debtor discharged upon bail, does not produce his statement and declaration, within the thirty days mentioned in article 766, such debtor and his sureties are subject to the same penalties and recourse as hereinabove.

Decisions.—Vide cases cited under Arts. 773 and 766 Supra.

777. If the allegations of the contestation are not proved, within the delays above mentioned, the court or judge may order the discharge of the debtor; and the latter cannot again be imprisoned for any debt due the plaintiff, or any other creditor, by reason of any cause of action anterior to his statement and declaration of abandonment; and in case of such imprisonment, he may obtain his discharge, either from the court or from a judge, upon petition and sufficient proof.

778. The abandonment of his property, deprives the debtor of the enjoyment of his property, and gives his creditors the right to have it sold, for the payment of their respective claims.

779. The abandonment of his property discharges the debtor from his debt, to the extent

only of the amount which his creditors have been paid, out of the proceeds of the sale of such property.

Decision.—Que rien n'empêche un créancier de prendre un jugement contre son débiteur, quand même celui-ci serait sous l'effet d'une loi de faillite, et n'aurait pas encore obtenu sa décharge ; et un plaidoyer à l'encontre de l'action du créancier ne contenant que l'allégation de cet état de faillite, sera rejeté sur réponse en droit.— *The Canadian Mutual Fire Insurance Co.* v. *Blanchard*, 2 M. L. R. 61, S. C. 1886.

780. Whenever a *capias* could not be executed, by reason of the absence of the defendant, or because he could not be found ; and when the defendant has left the province, or no longer resides therein and has ceased his payments, there may, after notice to the defendant or debtor, in the manner prescribed by the court or judge, be appointed a guardian and curator, whose powers and obligations shall be the same as if appointed after an abandonment of property.

PROVISIONS

REGARDING

ISSUE OF CAPIAS AD RESPONDENDUM.

797. When the amount claimed exceeds forty dollars, the plaintiff may obtain, from the prothonotary of the Superior Court, a writ of summons and arrest against the defendant, if the latter is about to leave immediately the province of Canada, or if he secretes his property with intent to defraud his creditors.

1. The writ of *capias* cannot issue for a foreign debt. Vide article 806 infra.

2. "The province of Canada," to wit: the provinces of Ontario and Quebec.

3. The province of Manitoba does not make part of Canada in the terms of 797 C. C. P., and consequently the debtor who leaves the province of Quebec for that part of the Dominion, cannot claim to be exempt from arrest under *capias* on that ground.—*Lainé et al.* v. *Clarke*, 2 R. C. 232.

798. This writ is obtained upon an affidavit [1] of the plaintiff, his bookkeeper, clerk, or legal attorney, declaring (*a*) that the defendant is personally indebted to the plaintiff in a sum amounting to or exceeding forty dollars, and (*b*) that the deponent has reason to believe and verily believes, for reasons specially stated in the affida-

1. See Form L.

vit, that the defendant is about to leave immediately the province of Canada, with intent to defraud his creditors in general, or the plaintiff in particular, and (*c*) that such departure will deprive the plaintiff of his recourse against the defendant; or upon an affidavit establishing, (*d*) besides the existence of the debt as above mentioned, (*e*) that defendant has secreted or made away with, or (*f*) is about immediately to secrete or make away with his property and effects with such intent.

Decisions.—1. The affidavit may be made by the bookkeeper of a branch of the Upper Canada Bank; (*The Bank of Upper Canada* v. *Alain*, 5 L. C. R. 318); the president of an incorporated company (*The Moisie Iron Co.* v. *Olsen*, 18 L. C. J. 29 Q. B.); the Plaintiff's wife *Chrétien* v. *McLane*, 3 R. L. 348.

2. If the plaintiff swears he believes the defendant is about to leave the province, from his own knowledge, he must state the cause of his belief.—*Chrétien* v. *McLane*, 3 R. L. 384.

3. It is not necessary to set forth in the affidavit the grounds of affiant's belief that the defendant is secreting his effects with an intent to defraud.—*D'Anjou & Thibaudeau*, 11 R. L. 512, Q. B.

4. Fraudulent preference, by which assets which should be available to the creditors generally are given to one or more, is equivalent to secretion.—*Gault* v. *Dussault*, 4 L. N. 321, Q. B. 1881.

5. A preference given by an insolvent debtor, to one of his creditors, constitutes secretion and renders the debtor subject to arrest by *capias*.—*Mackinnon & Keroack*, 15 R. L. 34, Q. B. Confirmed by Supreme Court of Canada.

6. Que le transport fait, par un débiteur insolvable, de tout son actif, à un de ses créanciers, dans le but de lui donner une préférence sur les autres, constitue la sous-

traction de ses biens, avec l'intention de frauder, justifiant l'émanation d'un *capias*.—*Nash* v. *Beuthner*, 16 R. L. 699, S. C. R. 1889.

7. Qu'une personne ne peut être arrêtée, sur *capias* ; parce qu'elle aurait recélé des biens appartenant au demandeur et non à lui-même, et que le recel justifiant le *capias* doit être des biens mêmes du défendeur.

Que le demandeur, qui a une action en reddition de compte, ne peut accompagner sa poursuite d'un bref de *capias ;* quand même, dans l'action, il réclamerait un montant déterminé, parce que tant que la reddition de compte n'est pas faite, et le compte débattu, il n'est pas certain que le défendeur doive un montant de quarante piastres.—*Gay* v. *Denard*, 15 R. L. 585, S. C. R. 1887.

8. Qu'un huissier immatriculé du district où émane un bref de *capias*, peut exécuter ce bref dans un autre district.

Qu'il n'est pas nécessaire d'indiquer, dans une déposition pour *capias*, le temps du recel, lorsque l'allégation est que le défendeur a recelé et est sur le point de receler.—*Trudeau* v. *Renaud*, 17 R. L. 647, S. C. 1889.

9. Conformably to the judgment of the Court of Appeals in *Hurtubise* v. *Bourret* (23 L. C. J. 138), it is not necessary to state in the affidavit, the date of the debt, nor the place where it was contracted, and the allegations as to secretion may be properly stated according to form 45 of the Code of Procedure, although that form is given in connection with another article.—*L'Heureux* v. *Martineau*, 6 Q. L. R. 275, S. C. 1880.

10. The word "personally" is not sacramental, and its omission from the affidavit is not fatal, if it otherwise appear in the affidavit, that the debt is personal.—*Ryle* v. *Corriveau Silk Co.* S. C. 1884.

11. An affidavit for *capias* alleging, that defendant is on the point of absconding from the heretofore province of Canada with intent to defraud his creditors, but without containing the reasons for deponent's belief, is irregular, and the *capias* will be quashed.—*Mitchell* v. *Benn*, 16 R. L. 431, S. C. 1888.

799. The writ may also be obtained if the affidavit establish, besides the debt, that the defendant is a trader, that he has ceased his payments and has refused to make an assignment of his property for the benefit of his creditors.

Decision.—A claim anterior to 48 Vic. Ch. 22, 1885, amending article 799 C. C. P. is not governed by that Statute, but by the law anterior thereto, according to which, a demand of abandonment could only be made, when a trader, notoriously insolvent, continued his business.—*Channel* v. *Beckett*, 17 R. L. 678, 1888.

Note :—Article 799 prior to the amendment 48 Vic. Ch. 22. S. 12 read as follows:

"The writ may also be obtained if the affidavit estab-
"lishes, besides the debt, that the defendant is a trader
"that he is notoriously insolvent, that he has refused to
"arrange with his creditors, or to make an assignment
"of his property to them or for their benefit, and that he
"still carries on his trade."

800. The writ of *capias* may likewise be obtained by any creditor having an hypothecary or privileged claim upon an immoveable, upon an affidavit establishing that his claim exceeds forty dollars, and that the defendant, whether he is the original hypothecary debtor or simply the holder of the property, is, with the intent of defrauding the plaintiff, damaging, deteriorating or diminishing the value of the immoveable, or is about to do so himself, or by others, so as to prevent the creditor from recovering the whole or any part of his claim, to the amount of forty dollars, as provided by chapter 47 of the Consolidated Statutes for Lower Canada.

801. If the demand be founded upon a claim for unliquidated damages, the writ of *capias* cannot issue without a judge's order, after exam-

ining into the sufficiency of the affidavit; and the affidavit in such case must state the nature and, moreover, amount of the damages sought, and the facts which gave rise to them, and the judge may in his discretion either grant or refuse the *capias*, and may fix the amount of the bail upon giving which, the defendant may be released.

802. The writ of *capias* may be joined with the writ of summons, or may be issued afterwards as an incident in the cause. In the latter case it must be accompanied with a summons for a fixed day, to show cause why the writ should not be declared valid, and joined with the principal demand. The writ may also issue after judgment has been obtained for the recovery of the debt.

Decisions.—1. Que lorsqu'un demandeur, dans une cause pendante devant la Cour de Circuit, fait émaner, en Cour Supérieure, un bref de *capias*, dans la même cause, il ne suffit pas d'alléguer et de prouver qu'il a intenté une action contre le défendeur en Cour de Circuit et qu'elle y est pendante, mais il faut qu'il demande en Cour Supérieure, et qu'il y prouve contre lui une créance suffisante pour justifier l'émission d'un bref de *capias*.—*Chevalier* v. *King*, 2 M. L. R., S. C. 1886.

2. Le *capias* émané après jugement obtenu, ne tend pas à l'obtention d'une nouvelle condamnation au paiement de la somme déjà accordée par le jugement sur lequel il est pris, mais seulement à ce que le *capias* soit joint à ce dernier jugement et déclaré valable.—*Drapeau* v. *Pacaud*, 6 Q. L. R. 140, S. C. R., 1880.

3. Qu'il n'est pas nécessaire que le bref de *capias* émané après jugement, soit émané comme un incident de la cause où le jugement a été rendu, et porte le même numéro de cette cause.—*Trudeau* v. *Renaud*, 17 R. L. 647, S. C. 1889.

4. A writ of *capias* based upon a judgment for a debt, cannot issue against the defendant, in a district other than that in which the judgment was rendered.—*Mathewson* v. *Bush*, 18 R. L. 7 Q. B. 1883. (Dorion C. J. & Cross, J. diss.)

803. The amount for which the writ of *capias* has issued, and the name of the person who made the affidavit, must be endorsed upon the writ.

804. It is not necessary that the declaration or statement of the demand should be served upon the defendant at the time of his arrest, but it suffices to leave a copy of it either with him, or at the office of the prothonotary, within the three days which follow the service.

805. Saving the exceptions contained in article 2272 and 2273 in the Civil Code, a writ of *capias* cannot issue :

1. Against priests or ministers, of any religious denomination whatever ;
2. Against septuagenarians ;
3. Against females.

806. It cannot issue for any debt created out of the province of Canada, nor for any debt under forty dollars.

Decisions.—1. An acknowledgment in this province, of a foreign debt, and of the obligation to pay it, is not sufficient to create a new debt within Canada, so as to render the debtor liable to arrest by way of *capias*.—*Metracomet Bank* v. *Paine*, 5 Q. L. R. 372, Q. B. 1879.

2. A writ of *capias* will lie against a debtor resident in Ontario, on the ground of secreting property in Ontario if he be found in this Province.—*Gault et al.* v. *Robertson*, 21 L. C. J. 281, S. C. R. 1877.

807. The affidavit required in the above articles may be made by one person only, or by several persons swearing each to a portion of the necessary facts, and it may be received and sworn to before a judge of the Superior Court, or a commissioner of the Superior Court, or by the prothonotary who certifies the writ of *capias*.

808. The Superior Court alone has jurisdiction in matter of *capias*.

809. When the *capias* is issued by the prothonotary of the Superior Court it is addressed either to the sheriff or a bailiff of the district in which such writ issues, and may be by him executed in such district or in any other district, or it is addressed to the sheriff or a bailiff of the district in which such writ is to be executed.

810. It may be issued by a clerk of the Circuit Court, in which case it is addressed to the sheriff or to any bailiff of the district in which it is to be executed.

811. The clerk of the Circuit Court acts in such case as an officer of the Superior Court, and the writ of *capias* must be worded throughout, as if it was issued by the prothonotary.

812. In all cases in which a writ of *capias* may issue, a warrant of arrest [1] may be granted by a commissioner of the Superior Court, and be addressed by him, either to the sheriff or a bailiff, or any other peace officer in the vicinity.

The commissioner cannot issue such warrant at the *chef-lieu* of a district, unless it be

(1) See forms M. and N.

established before him by affidavit that it was impossible for the plaintiff or his agent, to obtain such writ of *capias* from the prothonotary or his deputy.

813. Such warrant is in the name of the commissioner who grants it; it orders the arrest of the person therein designated and his delivery over to the sheriff of the district, who is commanded to keep him in his custody during forty-eight hours, and no longer, unless before the expiration of that time, the plaintiff has obtained and caused to be executed against such defendant, a writ of *capias* in the ordinary course.

814. The debtor cannot be detained in prison, in virtue of such warrant, any longer than forty-eight hours.

815. The commissioner granting such warrant, must, without delay, transmit a duplicate of it, together with the original affidavit upon which it was granted, and a certificate of his proceedings, to the prothonotary of the Superior Court of the district, who must file the same and keep them as part of the record in the case.

816. If the writ of capias is addressed to a bailiff, the bailiff who is charged with it, arrests the defendant and delivers him over, together with the writ, to the sheriff, who thereupon becomes responsible.

817. If the writ of capias is addressed to the sheriff he is then bound to execute it, or to cause it to be executed by his officers.

818. The sheriff is bound to keep the defendant in the common gaol of the district, until the latter gives security, or is discharged as hereinafter provided.

819. Upon a petition presented to the court, or to a judge in term or in vacation, the defendant may obtain his discharge, by establishing that he is not liable to be imprisoned, or by showing that the essential allegations of the affidavit upon which the capias is founded, are false or insufficient.

Decision.—The defendant must present simultaneously, all petitions he intends to present, whether in law or fact.—*Sutherland vs. Phillips*, Superior Court, Montreal, Dec., 1874.—Maintained in appeal 1875.

820. In order to decide upon this incidental proceeding, the court or judge may order the immediate return of the said writ of capias, and of the proceedings had upon it, although the day fixed for the return should not yet be arrived.

821. If the contestation is merely as to the sufficiency of the allegations of the affidavit, the judge or the court may dispose of it, after hearing the parties.—But if the contestation is founded upon the falsity of the allegations, issue must be joined upon the petition of the defendant, in the ordinary course, and independently of the contestation upon the principal demand, unless the exigibility of the debt depends upon the truth of the allegations of the affidavit, in which case the writ may be contested together with the merits of the case.

822. A defendant whose application to be discharged is rejected, may appeal from the decision.

823. If the court or judge orders the defendant to be discharged, the plaintiff may obtain a suspension of the order, by declaring immediately that he intends to have the decision reviewed, and depositing the amount required by article 497. He may likewise appeal from the judgment in review, if he declares immediately his intention of doing so, and causes the writ of appeal to be served within three juridical days from the rendering of the judgment in review. If the plaintiff fails to comply with these formalities the defendant is discharged.

Decisions.—**1.** The writ of appeal may be taken out on a *præcipe* without a petition. *Obiter dictum* of full court of appeal *in re Canadian Bank of Commerce vs. McMinn*, Montreal, 12th Dec., 1874.

2. Le demandeur, dans une poursuite accompagnée d'un bref de capias ad respondendum, peut, dans les huit jours du jugement, demander la révision d'une décision, sur une requête du défendeur, faite sous l'article 819 C. P. C. ordonnant sa libération, quoiqu'il n'est pas déclaré de suite, aux termes de l'article 823 C. P. C. qu'il entendait faire réviser la décision, et déposé le montant requis par l'article 497. *Channel vs. Beckett* 17 R. L. 678, S. C. 1888.

3. The immediate declaration by the plaintiff, required by art. 823, does not prevent him from inscribing for review in the ordinary way.—*Richardson vs. Fortin*, 17 Q. L. R. 18, S. C. R. 1886.

824. The defendant may obtain his discharge upon giving two good and sufficient sureties, that he will not leave the province of Canada, and that, in case he does so, such sureties will pay the amount of the judgment that may be rendered, in principal, interest and costs, or the amount fixed by the judge in the case of article 801.—But this bail cannot be received after the expi-

ration of the eighth day from the day fixed for the return of the writ of capias, unless with leave of the court expressly granted upon sufficient cause shown.

Decisions.—1. Even a temporary absence gives right of action against sureties.—*Thompson vs. Lacroix*, 4 Q. L. R. 312, S. C. 1878.

2. Where a capias has been declared good and valid, and the defendant in appealing from such judgment gives security for costs only, and files a declaration that he does not object to the execution of the judgment, the appeal does not suspend proceedings against the sureties.—*Lajoie vs. Mullin*, 21 L. C. J. 59, Q. B. 1876.

3. Une femme majeure et non pas sous puissance de mari, peut légalement être offerte comme caution judiciaire. *Slessor vs. Désilets*, 1 M. L. R. 306, S. C. 1884.

Civil Code, article 1938.—"The debtor who is bound to "find a surety must offer one, who has the capacity of "contracting, who has sufficient property in Lower "Canada, to answer the obligation, and whose domicile "is within the limits of Canada."—Art. 2272 also, exacts that any person indebted as a judicial surety is liable to imprisonment.

825. The defendant may also obtain his discharge, at any time before judgment, by giving good and sufficient sureties to the satisfaction of the court, or judge, or prothonotary, that he will surrender himself into the hands of the sheriff, when required to do so by an order of the court or judge, within one month from the service of such order upon him or upon his sureties, and that in default they will pay the amount of the judgment in principal, interest and costs, or the amount fixed by the judge in the case of article 801.

Decision.—1. Qu'un défendeur arrêté sur *capias* et qui a donné caution, aux termes de l'article 825 C. P. C. ne peut être emprisonné avant le délai d'un mois, à compter de la signification d'une ordonnance, lui ordonnant de se remettre sous la garde du shérif, et que la seule obligation de ces cautions, est de payer la dette sur son défaut de se livrer. *Thibaudeau vs. Villeneuve*, 17 R. L. 714 S. C. 1889.

826. This bail is offered after a notice served upon the plaintiff, or his attorney, with one intermediate day's delay.

827. The sureties offered must, if required, justify their sufficiency upon oath, but need not justify upon real estate.

828. A defendant arrested upon a capias may obtain his provisional discharge, by giving good and sufficient sureties to the sheriff, to the satisfaction of the latter, before the return day of the writ, that he will pay the amount of the judgment that may be rendered upon the demand, in principal, interest and costs, if he fails to give bail pursuant to article 824 or to article 825.—

Decisions.—1. On cause shown, the defendant, after a judgment maintaining a capias, and condemning him to pay the debt, will be permitted to put in bail or security that he will surrender himself in terms of the law in place of the bail given to the sheriff. He will also after judgment, on showing cause, be permitted to fyle the statement of his affairs required by C. S. L. C., c. 87, s. 12, (arts: 763 *et seq.* of this code), and plaintiff's petition for imprisonment will be dismissed in consequence of of such permission.—*Henderson vs. Lamoureux*, 17 L. C. R. 414.

2. Que les cautions d'un défendeur arrêté sur *capias*, qui se sont obligées par un cautionnement provisoire conformément à l'article 828 C. P. C. sont libérées de leur obligation, si le jour du retour du bref de *capias*,

ils livrent le défendeur entre les mains du Shérif, pour qu'il soit détenu en vertu du dit bref.—*Angers vs. Trudel*, 10 R. L., 556, Q. B. 1879.

3. Sureties under C. C. P. 828 are liable absolutely, without an order previously obtained requiring the defendant to surrender himself into the hands of the Sheriff.—*Duquette vs. Pattenaude* 4, L. N. 187, S. C. 1881.

829. The sheriff in such case is responsible only for the sufficiency of the sureties at the time when bail was given.

As to security by the sheriff, see 36 Vic., c. 15, Q.

830. He may free himself by offering an assignment of the bail-bond he has taken.—This assignment may be effected by simply endorsing his name upon the bail-bond.

831. The sureties may at any time arrest the defendant and surrender him into the hands of the sheriff and thus discharge themselves from their bond.

832. The sheriff, however, is not bound to receive the defendant, without a written requisition to that effect signed by the sureties or by one of them, or by their authorized attorney.—The requisition must contain the title of the court, the names of the parties to the suit, and of the sureties, and must require the sheriff to take the debtor into his custody ; and it is the duty of the sheriff to give the sureties a certificate of such surrender.

833. If the sureties apprehend resistance, then upon an affidavit of one of them, alleging their suretyship, sworn to before a judge, the

prothonotary, a commissioner of the superior court, or a justice of the peace of the district in which the debtor then is, and upon a requisition to that effect written upon the back of an affidavit, any bailiff or constable may arrest the debtor with such forcible assistance as may be necessary, and hand him over to the sheriff.

OF ATTACHMENT BEFORE JUDGMENT.

834. A creditor has a right, before obtaining judgment, to attach the goods and effects of his debtor:

1. In the case of the *dernier équipeur* ;

2. In all cases where, as plaintiff, he produces an affidavit [1] establishing (*a*) that the defendant is personally indebted to him in a sum exceeding five dollars, (*b*) that the defendant absconds or is about immediately to leave the province, or (*c*) is secreting or is about to secrete his property, with the intent to defraud his creditors or the plaintiff in particular ; or (*d*) that the defendant is a trader, that he has ceased his payments and has refused to make an assignment of his property for the benefit of his creditors ; and, (*e*) in either case, that the deponent verily believes that without the benefit of the attachment, the plaintiff will lose his debt or sustain damage.

Decisions.—1. Q'un créancier peut saisir avant jugement entre ses propres mains.

Que dans une action en reddition de compte, il n'y a pas lieu à une saisie-arrêt avant jugement.

Que, pour les fins d'une saisie-arrêt avant jugement, il faut que le défendeur recèle présentement lors de la date de l'affidavit, ou qu'il soit sur le point de receler.—*Dorion & Dorion*, M. L. R., 3 Q. B., 155 ; 1887.

2. An immoveable cannot be attached before judgment.—*Corbeil & Charbonneau*, 4. L. N., 277.

3. By "the province" is meant the heretofore Province

1 See Form M.

of Lower Canada.—*Beaulieu vs. Linklater*, 17 L. C. R. 406.

835. If the claim is founded on unliquidated damages, the writ of attachment cannot issue without the order of a judge after examining into the sufficiency of the affidavits, which, moreover, must state the nature and amount of the damages claimed and the facts which gave rise to them, and the judge may in his discretion either grant or refuse the writ, and fix the amount of the bail upon giving which the property may be released.

836. Simple attachment is effected by means of a writ addressed, both in the Superior Court, and in the Circuit Court, to the sheriff or a bailiff of the district in which such writ issues, who may execute it in such district or in any other district; or to the sheriff or a bailiff of the district in which it is to be executed and, when in any other court, to any bailiff, requiring such sheriff or bailiff to seize the moveables and effects of the defendant, and to summon him to appear on a day fixed at the office of the prothonotary or clerk, to answer the demand and shew cause why the attachment should not be declared valid.

837. The amount of the plaintiff's claim must be endorsed upon the writ, or the sum for which security may be given.

838. The writ is issued by the prothonotary or by the clerk of the Circuit Court, as the case may be, upon a written requisition from the plaintiff.

It may be either in the French or English language.

It is tested in the same manner as writs of summons.

839. The writ may also be issued for the Superior Court, according to the amount claimed, by any clerk of the Circuit Court, who, in such case, may likewise receive the necessary affidavit.

840. The provisions contained in articles 810 and 811 concerning writs of capias, apply likewise to simple attachment.

841. The seizure of the goods of the defendant is effected in the same manner, as upon the execution of a judgment.

The sheriff or bailiff may make the seizure in another district, if the debtor has conveyed his property there, or has withdrawn there himself.

842. A warrant of attachment may also be issued, in the case of article 834, by any Commissioner of the Superior Court, addressed to the sheriff of the district where the warrant is to be executed, or to the bailiff or peace officer nearest to his residence, commanding him to seize and detain the effects of the debtor.

843. This warrant of attachment is in the name of the commissioner who issues it; it orders the moveables and effects of the defendant to be attached, with the ordinary formalities of seizures, and that they be kept and detained for the period of twelve days from the seizure, and no longer, unless before the expiration of such twelve days, a writ of attachment, pursuant to

the above provisions, issues from the proper court.

844. The effects so seized cannot be detained for a longer period than twelve days, under such warrant of a commissioner.

845. The commissioner who granted such warrant must, without delay, transmit a duplicate thereof, together with the original affidavit upon which the warrant was granted, and a certificate of his proceedings, to the prothonotary, or clerk of the Circuit Court, who must file and keep the same as part of the record in the case.

846. When in the Superior Court the writ or the warrant is addressed to a bailiff or any other officer than the sheriff, such bailiff or other officer is bound to make a return of his proceedings to the sheriff, and to deliver to him the effects seized, in order that they may be disposed of by the court, according to law.

847. The sheriff or bailiff may also demand in advance from the party suing out the writ, or his attorney *ad litem*, such sum as may be deemed sufficient by the judge or the prothonotary of the Superior Court from which the writ issued, for the safe-keeping of the effects seized.

848. The sheriff or bailiff may renew such demand, as often as the sum so advanced is expended, by presenting a petition, of which notice has been given to the party seizing or his attorney *ad litem;* and if the amount fixed by the judge or prothonotary is not paid within twenty-four hours, the seizure is discharged, and the

sheriff or bailiff is exonerated from any liability whatever.

849. The writ of attachment must be returned with an inventory of the seizure, and a certificate of service both of the writ and of the declaration, in the same manner as upon a writ of capias.

850. A copy of the writ of attachment must be left with the defendant, as well as a duplicate of the inventory of the seizure, as soon as it is completed. As regards the declaration, it may either be served at the same time as the writ, or within the three days which follow the seizure, by leaving a copy thereof either with the defendant or at the prothonotary's or clerk's office.

851. The effects seized must, in every case, be placed in the custody of a responsible person offered by the defendant, or, in default of such offer in the custody of a responsible person appointed by the sheriff, bailiff, or other officer making the seizure, subject to the provisions respecting guardians and depositaries in cases of execution against moveables.

852. If the defendant is absent from Lower Canada, or conceals himself, so as to prevent the service of the writ of attachment, the court, or a judge, upon proof of the fact by one credible witness, may dispense with the service, and order the defendant to be summoned in the manner provided in article 68.

853. A defendant whose effects have been seized may get them restored to him by the

sheriff, within the forty eight hours from the service of the inventory of seizure :

1. By depositing with the sheriff, bailiff, or other officer charged with the writ, the amount endorsed on the writ and costs ; or

2. By giving the sheriff, bailiff or other officer charged with the writ, who is bound to accept them, good and sufficient sureties, who satisfy under oath to the amount endorsed upon the writ with interest and costs, that he will justify the judgment that may be rendered.

In default of his doing so within the specified delay the effects remain under seizure to satisfy the judgment, unless the court or a judge orders otherwise.

854. Simple attachment may be contested in the same manner as writs of capias.

OF ATTACHMENT BY GARNISHMENT.

855. In all the cases where a writ of simple attachment may be granted as hereinabove explained, a creditor may also attach any moveable property belonging to his debtor which may be in the hands of third persons, and also whatever sums they may owe him, subject to the restrictions mentioned in articles 558 and 628.

856. This attachment is effected by means of a writ commanding the attachment in the hands of the garnishees of whatever sums of money, things or effects they have or may have, belonging or due to the defendant, ordering the garnishees not to dispossess themselves thereof without an order of the court, and to appear at the office of the prothonotary or clerk, to make

their declaration, and summoning the defendant to answer the demand of the plaintiff.

Decisions.—1. That the garnishee who is in possession of moveables belonging to defendant is, by the service of the writ of attachment, constituted judicial guardian of them.

That where the garnishee makes default to declare, and is insolvent, the plaintiff is entitled to a rule *nisi* to prove that the garnishee is in possession of the moveables, and to have him condemned to deliver them to the bailiff charged with a writ *de venditioni exponas.*—*Bertrand & Meunier & McKibbin*, 16 R. L., 266, C. C. 1888.

2. Where the garnishee has declared that he owes the defendant nothing, but in answer to questions put by the judgment creditor, under C. C. P., 619, has made admissions which apparently show that he has a sum in his hands belonging to the defendant, that the proper course is to contest the declaration, and not to inscribe for judgment *ex parte* on such statements.—*Grant* v. *Federal Bank of Canada*, M. L. R., 2 Q. B., 4; 1885.

3. Judgment on the declaration of a garnishee, operates a judicial assignment to the plaintiffs, and an opposition subsequently filed by another creditor, alleging insolvency of the defendant (as of date of opposition), and asking that the money be paid into court, is insufficient, and will be rejected on motion.—*Taylor vs. Brown & Federal Bank*, 7 L. N. 62 S. C. 1884.

4. A judgment quashing an attachment before judgment *en mains tierce*, at once releases the property seized, from the attachment, and the *tiers-saisi* must pay it over to the owner without any delay, when required so to do.—*Pleau vs. City and District Saving Bank*, 30 L. C. J., 167, S. C. R., 1886.

857. When the writ issues from the Superior or the Circuit Court, it may be addressed either to the sheriff or to a bailiff of the district in which such writ issues, and be by him executed, in such district, or in any other district, or to

the sheriff or a bailiff of such other district, in which such writ is to be executed, and in any other court, to a bailiff.

858. It is clothed with all the formalities required for ordinary writs of summons, and is subject to the provisions of articles 838, 839, 840, 842, 845, 846, in so far as they can be applied.

859. A statement of the amount for which the attachment is made or authorized is, moreover, endorsed upon the writ.

860. The provisions contained in articles 614, 615, 616, 617, 618, 619, 620, 622, 623, 624, 625, 629, 630 and 631, are also applicable to cases of attachment by garnishment before judgment.

861. If the declaration of the garnishee is not contested, the court or judge, in rendering judgment upon the principal demand, adjudicates also upon the attachment, and the declaration of the garnishee.

862. The plaintiff or the defendant may contest the declaration of the garnishee, upon leave of the court to that effect.

Such contestation is served upon the garnishee, together with a summons to appear on a day fixed to answer the same, the ordinary delays for summoning being observed.

863. In other respects the contestation is subject to the rules of ordinary procedure.

864. If the plaintiff fails to contest the declaration of the garnishee within eight days after the principal judgment, he is foreclosed from

doing so, unless the delay is extended by the court.

865. The defendant may contest the attachment made upon him, or in the hands of a garnishee, in the manner provided for cases of *capias*.

OF ATTACHMENT IN REVENDICATION.

866. Whoever has a right to revendicate a moveable, may obtain a writ for the purpose of having it attached, upon production of an affidavit (1) setting forth his right and describing the moveable so as to identify it.

This right of attachment in revendication may be exercised by the owner, the pledgee, the depositary, the usufructuary, the institute in substitutions, and the substitute.

Decisions.—1. That the curator to the property abandoned by an insolvent trader, has the right to revendicate goods removed without his consent from his custody, without previously taking the advice of the creditors and being judicially authorized.—*Kent et al. & Ross et al.*, 16 R. L., 209. S. C. R., 1888.

2. That a guardian is entitled to reclaim by a seizure in revendication goods taken out of his possession and to which he was duly appointed guardian.—*Moisan* v. *Roche*, Q. B., 1877; 4 Q. L. R., 47. Vide also *Gilbert & Conidet*, Q. B., 1877; 4 Q. L. R, 50.—*Wheeler & Dupaul*, Q. B., 1887; 15 R. L., 564.

3. But not if the guardian had allowed a person in good faith, to purchase the goods of defendant without notifying him that they were under seizure.—*Duperré* v. *Dumas*, 8 Q. L. R., 333.

Civil Code, Art. 1998 provides: "The unpaid vendor of "a thing has two privileges; (1) a right to revendicate it; "(2) a right of preference on the price. In the case of

(1) See form P.

1. See Form N.

"insolvent traders, these rights must be exercised within "fifteen days after the delivery.

Civil Code, Art. 1999. The right to revendicate is subject to four conditions :

"(*a.*) The sale must not have been made on credit ;

"(*b.*) The thing must still be entire and in the same "condition ;

"(*c.*) The thing must not have passed into the hands "of a third party who has paid for it.

"(*d.*) It must be exercised within eight days after the "delivery, saving the provision concerning insolvent trad- "ers contained in the last preceding article (1998)."

4. Que les provisions de l'article 1998 C. C., limitant l'exercice du privilège du vendeur aux quinze jours qui suivent la vente dans les cas de faillite, s'appliquent non seulement au cas de faillite sous l'empire d'un acte de faillite, mais au cas d'insolvabilité sous le droit commun, quand un commerçant cesse ses paiements (Art. 17, § 23).

Que lorsque l'acheteur y consent, le vendeur qui est dans les conditions voulues pour revendiquer, peut se faire remettre à l'amiable les marchandises vendues, sans avoir besoin de les faire saisir par voie de revendication.

Que l'expression "les quinze jours qui suivent la vente," dans le dit art. 1998, doit s'entendre de la vente parfaite, et partant, si les marchandises sont vendues au poids, au compte ou à la mesure, et non en bloc (art. 1474 C. C.), le délai pour revendiquer ne commencera à courir, que du moment où elles auront été pesées, comptées ou mesurées. *Thibaudeau & Mills*, M. L. R. ; 1 Q. B., 326, 1885 ; Q. B.

Note.—Since the foregoing decision, art. 1998 Civil Code has been amended by the substitution of the word delivery for sale. The article now reads as above quoted.

Decisions :—5. He who sells a moveable and retains the right of ownership until perfect payment of the promissory notes given by vendee in payment of the price, cannot revendicate the moveable from a third party in good faith, who has bought the moveable from the first vendee before the maturity of the notes.

In the case of a moveable lost or stolen however, the owner can revendicate in the hands of a third party.—*Goldie vs. Bisaillon*, 7 L. N., 347, S. C. 1884.

6. *Brown vs. Lemieux*, 3 R. L. 361.

7. Que lorsque, dans une saisie-revendication, le demandeur a obtenu un jugement d'un des juges de la Cour Supérieure lui accordant la possession des effets saisise pendant l'instance, et qu'une autre des parties dans la cause porte ce jugement en appel, le demandeur peut obtenir l'exécution du jugement par provision, nonobstant l'appel.—*Whitehead vs. Kieffer et al.* et *White*, 1 M. L. R. 287. S. C., 1884.

8. Dans une saisie-revendication, le demandeur peut régulièrement, avec la permission de la cour obtenue sur requête, amender la description des effets saisis même avant le jour du retour de l'action, en en donnant avis aux autres parties.—*Legru vs. Dufresne*, et *Ryan*, 1 M. L. R., 315 S. C. 1885

9. Although a voluntary guardian has consented to leave effects seized, in defendant's possession, he can nevertheless reclaim them by *saisie-revendication* if he have just reasons to fear that the goods may disappear and if defendant refuse to permit him to take possession of them.—*Dupas vs. Wheeler & Wheeler*, 1 M. L. R., 147 S. C. R. 1884.

10. A third party who intervenes in a *saisie-revendication* to claim certain of the goods seized, has no right to costs against the plaintiff who, save as to costs, admits the intervention. *Ibid.*

11. In the absence of fraud or collusion, the owner of moveables cannot revendicate them from the purchaser at a judicial sale. His recourse is on the price, or against the seizing party.—*Mackie vs. Vigeant*, 1 M. L. R. 382, S. C. 1885.

12. A judicial sale may be set aside for irregularities in the proceedings as well as for fraud or collusion; and where a piano not the property of defendant was seized and sold as belonging to him, for an insignificant part of

its value ; and it further appeared that there was no bidder at the sale, except the person who purchased the piano, it was held that the sale was a nullity, and that the owner was entitled to revendicate the property. —*Nordheimer vs. Leclaire*, 2 M. L. R. 446 ; Q. B. 1886.

867. The writ of attachment in revendication orders the seizure of the effects revendicated, and that they be placed in the hands of guardians until judgment is rendered upon the revendication.

The name of the person upon whose affidavit the writ issues, is mentioned upon the back of the writ.

868. The formalities prescribed in articles 809, 836, 838, 847, 848, 849, 850 and 851, are observed in attachments in revendication, in so far as they can apply.

869. The defendant upon a demand in revendication may have the effects returned into his possession, upon giving good and sufficient sureties, that he will produce them when required, which he is in such case bound to do, in the same manner as any judicial sequestrator.

Nevertheless the court or judge may, according to circumstances, grant possession of the effects to the plaintiff, subject to the same conditions.

870. Before the effects are delivered to the party applying for them, the other party may require an inventory thereof to be made, establishing the condition of the effects, their description and their value, in order to settle the amount of the security to be given ; and this is done by experts named in the ordinary course of procedure

871. If neither of the parties applies for the effects seized, they remain in the custody of the guardian appointed ; or else, at the request of either of the parties, the court or the judge may, if they are of a nature to produce fruits, order them to be placed in the hands of a sequestrator.

872. If the things seized are of a perishable nature, or liable to deteriorate during the pendency of the suit, the court or judge may order them to be sold and the proceeds of the sale to be deposited in the office of the prothonotary, or clerk.

OF CONSERVATORY ATTACHMENT.

THE law as to conservatory attachment in the Province of Quebec, differs from that affecting other attachments and special remedies, in that no special rules for its exercise have been formulated in the Code of Civil Procedure.

The jurisprudence that has grown up, clusters about articles 1543 of the Civil Code, and a few texts from the *Coutume de Paris*. Under the authority of article 1543, which is based upon the *Coutume de Paris*, the unpaid vendor of moveables, who seeks to dissolve a sale by reason of the non-payment of the price, has a right to the benefit of a conservatory attachment against the moveables sold, to conserve the same, pending adjudication upon the merits of the action to dissolve the sale.

"GUYOT justifies this legal remedy in the following terms:

"Un immeuble ne peut pas soustrait aux re-
" cherches de celui qui le revendique, quand la
" demande est légitime; mais il en est autrement
" d'un meuble, celui qui le possède peut aisément
" le détourner; il est donc juste que celui qui
" s'en prétend propriétaire puisse faire les actes
" conservatoires convenables pour s'en assurer la
" restitution quand il aura justifier sa demande."
1 *Rep. Vo. Actes conservatoires*, p. 148.

Civil Code, Article 1543. "In the sale of move-
" able things, the right of dissolution by reason
" of non-payment of the price can only be exer-

" cised while the thing sold remains in the pos-
" session of the buyer, without prejudice to the
" seller's right of revendication as provided in the
" title of *Privileges and Hypothecs.*[1] In the
" case of insolvency such right can only be exer-
" cised during the fifteen days next after the
" delivery."

Coutume de Paris, Article 176. " Qui vend au-
" cune chose mobilière sans jour et sans terme,
" espérant être payé promptement, il peut sa
" chose poursuivre, en quelque lieu qu'elle soit
" transportée, pour être payé du prix qu'il soit
" transportée, pour être payé du prix qu'il l'a
" vendue."

Coutume de Paris, Article 177. " Et néanmoins
" encore qu'il eût donné terme si la chose se
" trouve saisie sur le débiteur par autre créan-
" cier, il peut empêcher la vente ; et est préféré
" sur la chose aux autres créanciers."

Decisions.—1. The legality of a saisie-conservatoire cannot be attacked by petition to quash ; the proper proceeding is by way of exception.—*Torrance vs. Thomas* 2, L. C. J. 98 ; S. C. 1857.

2. An affidavit is not necessary to obtain the benefit of a conservatory attachment, which is based on the authority of article 177 *Coutume de Paris* and was not affected by the *Ordonnances* 1777 and 1795 which required affidavits for the special seizures therein specified. Motions to quash, and an exception *à la forme* containing the same moyens, were rejected as illegal methods of attack, as against a conservatory attachment.—*Sinclair vs. Ferguson ; Robertson vs. Ferguson ; Mills vs. Ferguson*, 2, J. 101, S. C. 1857.

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1. Civil Code, arts. 1998, 1999 cited supra p. 43-4.

3. The right to a conservatory attachment, in virtue of the *Coutume de Paris*,—not abrogated by Statute. Affidavit not necessary.—*Leduc* v. *Tourigny*, 5 L. C. J., 123. S. C., 1861.

4. In an action by the vendor of goods sold and delivered, for the recovery of the price of sale, accompanied by a *saisie conservatoire* of such goods, the Plaintiff has a right to demand by the conclusions of his declaration, that the Defendants be condemned to pay the price of sale; that the goods seized be declared subject to a privilege in favour of the Plaintiff, as vendor, for such price of sale, and that the goods be sold in due course of law and the proceeds paid to the Plaintiff in satisfaction *pro tanto* of his claim as vendor.

That where goods so seized, have been delivered to Plaintiff during the pendency of the suit, on his giving security that they will be forthcoming to abide the future order of the court, or the value thereof accounted for by Plaintiff, such value shall be held to be the value of the goods at the time of their delivery to the Plaintiff, from which date the Plaintiff shall be accountable, with interest.—*Baldwin* v. *Binmore*, 6 L. C. J., 297. S. C., 1861.

The unpaid vendor who has sold for cash, has a right, under article 176, *Coutume de Paris*, to follow the thing sold wherever he can find it, if the purchaser fail to pay as agreed; and that in such a case a *saisie conservatoire* is a lawful remedy.—*Duchesnay* v. *Watt*, 8 L. C. J., 169, S. C., 1864.

6. L'ouvrier employé dans les chantiers de bois, en Canada, a un privilège sur le bois ainsi confectionné, et a droit à la *saisie-conservatoire* sur les radeaux formés de ce bois.—*Coté* v. *Graham*, 3 R. L., 571. S. C.; 4 R. L., 3; Q. B., 1872.

7. Que le Code de Procédure civile, en donnant les moyens d'obtenir certains brefs, pour saisir avant jugement, ne limite pas les cas dans lesquels l'on peut ainsi saisir; et n'empêche pas de recourir à la *saisie conservatoire* pour saisir et arrêter l'objet sur lequel la loi donne droit de gage et de rétention.—*Trudel* v. *Trahan*, 7 R. L., 177. S. C., 1874.

8. The unpaid vendor of moveables has a right, under article 1543 of the Civil Code, to demand the resolution of the sale, under the circumstances stated in that article, even after the expiration of the eight days allowed for revendication by article 1999. (But vide amendment to C.C., 1543 *suprà.*)

In an action claiming such resolution, the plaintiff has a right to attach the moveables by a *saisie conservatoire* and, although his attachment may be in the nature of a *saisie-revendication*, it will nevertheless avail to him as a *saisie-conservatoire.*—*Henderson* v. *Tremblay*, 21 L. C. J., 24; Q. B., 1876.

9. The holder of railway bonds, constituting a privileged claim on the moveable property of the company, may, for the protection of his rights, proceed against such property by an attachment in revendication in the nature of a *saisie conservatoire.*—*Wyatt* v. *Senécal et al.*, 4 Q. L. R., 76; S. C., 1878.

10. The unpaid vendor has a right of action, under C. C. 1543, to rescind a sale of 473 half-chests of tea, for non-payment of the price, and to accompany his action by a *saisie conservatoire.*— *Lambe* v. *Hartlaub* 4 L. N., 138; S. C., 1881.

11. The action began by *saisie-conservatoire.* Defendant met the affidavit by *exception à la forme*, which was dismissed as not being the mode indicated by the Code for attaking the affidavit. The party moving cited *Leslie & Molson's Bank*, 12 L. C. R., p. 265. The Court, without expressing any opinion as to whether the Code had altered the law since the decision referred to, refused leave to appeal, on the ground that the party moving had a more expeditious mode of proceeding than by exception à la forme, and that therefore nothing but delay would result from granting the appeal. —*Lebel vs. Pacaud*, 2 L. N., 202; Q. B., 1879.

12. An affidavit such as is required by the Code for a *saisie-arrêt* before judgment, is not necessary for a *saisie-arrêt conservatoire*, which is a common law process, and cannot be attacked by petition to quash.—*Burnett vs. Pomeroy et al.*, 7 L. N., p. 110, S. C. 1884.

13. Aucune loi positive n'exige la production d'une déposition pour obtenir un bref de saisie conservatoire, dans les cas où ce bref peut émaner; et celui qui se prétend propriétaire d'actions de banque, et qui a raison de craindre qu'on ne fasse disparaître ces actions, peut joindre à une demande pour être déclaré propriétaire de ces actions, une saisie-arrêt conservatoire.—*Fraser vs. McTavish & Bank of Montreal*, 15 R. L., 200, S. C. 1887.

14. Where the *action résolutoire* exists, it may be exercised *quoad* any portion of the goods remaining in the possession of the vendee, and may be accompanied by a *saisie conservatoire* to preserve those goods, pending the action; that in the event of but a portion of the goods being recovered under the *action résolutoire*, the unpaid vendor can rank only as an ordinary creditor, for the value of the goods which have not been restored to him, he repaying to the estate the amount of freight, and charges expended by the insolvent or the estate, upon the goods so restored to the unpaid vendor. *Unanimous opinion of Eminent Counsel.—Re A. & C. J. Hope & Co.*, 6 L. N. 20, January 13, 1883.

15. *Saisie conservatoire* by unpaid vendor, of goods sold *à terme* to secure payment by privilege from proceeds of sale, the purchaser having become insolvent within 15 days of delivery. The goods, 7000 cigars in boxes, had been packed and shipped in one large wooden case, which had been opened by purchaser and the boxes exposed for sale. Some of the latter, were broken but 6675 cigars remained intact and were seized: *Held* that the goods seized being entire and in the same condition as when sold, notwithstanding the opening of the outer bale or case, the seizure was good and valid.—*Goulet & Green*, 13 Q. L. R., 103, Q. B. 1887.

APPENDIX.

Fees payable to the Prothonotary of the Superior Court, upon proceedings and things done, in virtue of the Act respecting the abandonment of property, and described in the following tariff:

1. Upon the production of a demand of abandonment.....	$ 0.50
2. Upon the production of the balance sheet by the debtor and the appointment of a provisional guardian	2.00
3. For the attendance of the Prothonotary at the meeting appointing a curator.....	2.00
4. Upon the production of a petition contesting a demand for abandonment, or the balance sheet furnished by the debtor.....	4.00
5. Upon every answer in writing to contestation	2.00
6. Upon every petition or demand not specially mentioned above.	1.00
7. Upon every contestation of dividend sheets prepared by the curator	2.50
8. Upon every answer to motion, petition, or contestation.....	1.00

9. Upon every motion, rule, order, copy of judgment, commission to examine witnesses, and other incidental proceedings not specified above, the same fees as those required by the tariff of the Superior Court in first class actions.....	1.00
10. On any desistement.....	1.00
11. On any inscription at enquête..	1.00
12. Inscription for hearing.....	2.00
13. On each copy of notice to creditor, calling meeting of creditors	0.10
14. Attorney's fee on any motion, or petition.....	3.00
15. Attorney's fee on proceedings up to appointment of curator.....	16.00

Fee on any contestation, to be the same as in the Superior Court in ordinary actions.

FORM A

Demand of Abandonment (Art. 763*a*,) *to be drawn in duplicate and served by a bailiff who endorses his return of service.*

To ——— (*name, residence, and occupation of the debtor*).

You are hereby required, to wit, by ——— (*name, residence, and occupation of the creditor*), your creditor in the sum of $, whose claim is unsecured, to make a judicial abandonment of your property for the benefit of your creditors, in the office of the prothonotary of the Superior Court for Lower Canada in the District of , the whole according to law.

Dated and signed at , this day of 188 .

(*Signature of creditor*).

FORM B

Abandonment (Art. 764).

Province of Quebec, }
District of . } Superior Court.

_____ *Creditor.*

vs.

_____ *Debtor.*

———, the said debtor being duly sworn doth depose and say :

1. That he, the said debtor, hereby declares that he consents to abandon all his property to his creditors ;

2. That his moveable property consists of the following :

(*Here give description of moveable property.*)

3. That his immoveable property consists of the following :

(*Here give description of immoveable property, and add signature and jurat.*)

FORM C

Notice of Abandonment (Art. 765).

(For advertisement.)

Province of Quebec, }
District of . } Superior Court,

Creditor.

vs.

Debtor.

Notice is hereby given that I, the undersigned of in the District of , did, on the day of 188 , in the office of the prothonotary of the Superior Court in the District of , make a judicial abandonment of my property for the benefit of my creditors.

Signed at , this day of 188 .

Note: In default of this notice being given by the debtor, any creditor may give it himself. Art. 765, *supra*.

(*Signature of debtor.*)

FORM D

Demand of Abandonment. (Art. 766).

Province of Quebec, }
District of , } Superior Court.

A. B., *Plaintiff,*

vs.

C. D., *Defendant.*

To C. D. the said Defendant.

SIR,

The debt for which judgment was rendered in this cause, exceeding $80, and being of a commercial nature, and your moveable and immoveable property having been discussed, you are hereby required to file a statement of your moveable and immoveable property, and a declaration of abandonment of the same, according to law, under pain of all legal penalties.

Signed at , this day of 188 .

Plaintiff's attorney.

FORM E

Petition to summon Creditors (Art 768.)

In re

(*Name, residence, occupation, and firm name of debtor*).

Debtor.

and

(*Name, residence, occupation, and firm name of petitioner*).

Petitioner.

To any of the Honourable Judges of this court, the petition of the said petitioner humbly sheweth.

That on the day of instant 188 , the said debtor did make an abandonment of his property, for the benefit of his creditors.

That it is advisable that a meeting of the said creditors be forthwith held, to advise as to the appointment of a curator, and inspectors and advisers, according to law.

Wherefore petitioner prays, that a meeting of the creditors of the said debtor, be forthwith called, to appoint the said curator, and if deemed advisable, inspectors or advisers, the whole in such manner as to your honour may seem fit, with costs of these presents *distraits* to the undersigned attorney.

———————, 188 .

Attorney for petitioner.

FORM F

Notice of Meeting of Creditors (Art. 768).

Province of Quebec,
District of ,

Superior Court.

_____ *Debtor.*

and

_____ *Petitioner.*

The said debtor, having made a judicial abandonment of his property for the benefit of his creditors on the day of 188 , the creditors of the said debtor, are notified to meet in the office of the undersigned prothonotary, on the day of 188 , at o'clock in the noon to advise as to the appointment of a curator, and inspectors or advisers herein.

Signed at , this day of 188 .

(*Signature of prothonotary*).

FORM G

Notice to seizing Creditor, his Attorney or Bailiff (Art. 769).

Province of Quebec, }
District of , } Superior Court.

No.

Plaintiff.

vs.

Defendant.

You are hereby notified, in accordance with article 769 of the Code of Civil Procedure, that on the day of 188 , the said E. F., of (*state name, address, and occupation of curator*) was by judgment of (*name court or judge*), duly appointed curator to the property of the said C. D., of (*residence or domicile, and occupation of the debtor*) defendant herein, abandoned by the said C. D., for the benefit of his creditors, the whole as by said Code provided. And you are hereby notified and required to govern yourself in the premises accordingly.

Signed at , this day of 188 .

E. F., *Curator.*

FORM H

Notice of Appointment by Curator (Art. 770).

Province of Quebec, } Superior Court.
District of , }

No.

_____ *Debtor.*

and

_____ *Petitioner.*

and

_____ *Curator.*

Notice is hereby given, in pursuance of article 770 of the Code of Civil Procedure, that on the day of 188 , I the said E. F., of (*describe curator*), was by judgment of (*describe court or judge in question*), appointed curator to the property of the said C. D., of (*residence or domicile, and occupation of the debtor*), debtor in this matter, the whole as by said Code provided.

The creditors of the said ——— are hereby notified to file their claims with me, within a delay of thirty days.

Signed at , this day of 18 .

E. F. *Curator.*

FORM I

Curator's Warrant to Sheriff (Art. 772).

Province of Quebec, District of , } Superior Court.

No. _____ *Debtor.*

_____ *Petitioner.*

and

_____ *Curator.*

To ———, Sheriff of the District of

Sir,

I, the undersigned ———, Curator duly appointed, by order of (*state court or judge*), of date of the day of 188 , to the property of the said defendant ——— of (*residence or domicile, and occupation of debtor*), and authorized (*or commanded*) by order of (*state court or judge*), do hereby require you, under Art. 772 of the Code of Civil Procedure, to seize and sell, in accordance with the provisions of the said Article 772 the following immoveables, heretofore the property of the said debtor.

(*Describe immoveables*).

Signed at , this day of 188 .

E. F., *Curator.*

FORM J

Notice of preparation of dividend sheets

(Art. 772*a*).

Province of Quebec, }
District of . } Superior Court,

_____ *Creditor.*

vs.

_____ *Debtor.*

and

E. F., *Curator.*

I, the undersigned E. F., Curator, duly appointed to the property of the said E. F.,——— debtor, do hereby give notice that a dividend sheet has been prepared in this matter pursuant to article 772*a* of the Code of Civil Procedure, payable within fifteen days from receipt of this notice and that all persons are required to govern themselves accordingly.

Signed at , this day of 188 .

E. F., *Curator.*

FORM K

Form of Claim (Art. 770).

Province of Quebec, District of . } Superior Court.

_____ *Petitioner.*

vs.

_____ *Debtor.*

and

_____ *Curator.*

and

_____ *Claimant.*

I, G. H., of being duly sworn do depose and say :

1. I am the claimant (*or the duly authorized agent of the claimant*), in this matter *or* a member of the firm of claimants in this matter, and the said firm is composed of myself and of J. K.

2. The debtor is indebted to me (*or to the claimant*) in the sum of dollars for (*state the nature and particulars of the claim,*)

And I have signed,

(*Signature*) E. F., *Claimant*

Sworn before me at this day of }

Note :—A creditor is not bound to disclose or to value his security. Vide *Thibaudeau & Benning* cited page 9 supra.

FORM L

Affidavit for Capias.

Province of Quebec,
District of } In the Superior Court.

A. B. (*here describe the plaintiff*, or *other deponent*,) being duly sworn, doth depose and say :

1. That the said defendant, C. D. (*here describe the defendant*,) is well and truly and personally indebted to the said plaintiff in a sum exceeding forty dollars, to wit, in the sum of (*here state the amount due*) which said indebtedness arose as follows : (*here state the cause of action succinctly, alleging time, place, and circumstance.*)

2. That this deponent hath reason to believe and doth verily believe, that the said defendant is about to leave immediately the heretofore province of Canada : to wit the provinces of Quebec and Ontario, with intent to defraud his creditors in general, and the plaintiff in particular, and this deponent's reasons for believing as aforesaid are the following : (*here state the reasons*). And that such departure of the defendant will deprive the plaintiff of his recourse against defendant.

(*Or, in the case of secretion, the following instead of paragraph* 2.)

3. That the said defendant has secreted and made away with, *or*

That the said defendant is about immediately to secrete and make away with his property and effects with intent to defraud his creditors in general and the plaintiff in particular.

(*Or, in the case of refusal of debtor, to comply with a demand of abandonment,* art. 799 *the following :*)

4. That the said defendant is a trader; that he has ceased his payments and although duly required so to do, has refused and still refuses to make an assignment or abandonment of his property for the benefit of his creditors generally.

5. That without the benefit of a writ of *capias ad respondendum,* the said plaintiff may lose his debt and suffer damage. And the said deponent hath signed.

(JURAT.)

FORM M

Affidavit for Warrant of Arrest. (Arts 812, 813.)

Province of Quebec }
District of }

A. B. of etc. (*description of deponent*) being duly sworn, doth depose and say, that C. D. of etc., is personally indebted to (*describe plaintiff fully*) in a sum exceeding forty dollars, to wit: in the sum of ——— (*State here the cause of indebtedness circumstantially*).

(*Use Paragraphs* 2, 3 *or* 4 *of Form L. as may be required.*)

That it has been, and is impossible for the plaintiff or his agent, to obtain a writ of *capias ad respondendum* from the prothonotary of the Superior Court in the said district or from his deputy.

That without the benefit of a warrant of attachment against the body of the said defendant, the said plaintiff will lose his recourse and sustain loss and damage; and this deponent hath signed.

Sworn before me this day of
A. D.

FORM N

Warrant to arrest the person (Art. 812).

Province of Quebec,
District of Montreal.

A. B, Esquire, Commissioner of the Superior Court for Lower Canada, in the district of

To of etc. bailiff, and to the keeper of the common gaol of the said district. I command you, that you take (*describe defendant*) and him, with all due diligence, convey to the common gaol of the said district and deliver to the keeper thereof, together with this warrant; and I do hereby command you, the said keeper, to receive the said defendant and him safely keep, for the space of forty-eight hours, and no longer, unless, before the expiration of that time, a writ of *capias ad respondendum*, be duly served upon him, to compel him to be and appear personally, in the Superior Court for the said district, on the day of the return of said writ, to answer the said plaintiff of a certain debt, interest, and costs amounting to the sum of

Given under my hand and seal, this day of A. D.

(Signed)

Commissioner of the Superior Court in the district of

FORM O

Affidavit for Attachment before Judgment
(Arts. 834 and 855.)

Canada :
Province of Quebec. } COURT
District of Montreal.

A. B. &c. of — Plaintiff

C. D. &c. of — Defendant

and — Tiers saisi.

A. B. of—(*description of deponent.*)

said Plaintiff (*or* the duly authorized agent of the Plaintiff in this behalf) being duly sworn doth depose and say :—That heretofore, to wit, at in the District of on the day of eighteen hundred and eighty the said Defendant was and still is, well and truly and personally indebted to said Plaintiff in a sum exceeding five dollars currency, to wit, in the sum of dollars and cents currency, being as and for (*Here state succinctly, the cause of indebtedness*)

That the said Defendant is about immediately to leave the province of Quebec with intent to

defraud his creditors in general, and the Plaintiff in particular and deponent verily believes that without the benefit of a writ of attachment before judgment to seize and attach the goods and effects of the said Defendant, the said Plaintiff will lose his debt and sustain damage.

That said Defendant is secreting and making away with, or is about to secrete and make away with his goods and effects, with intent to defraud his creditors in general, and the Plaintiff in particular. (*If it is wished to attach goods effects, debts monies or estate of the Defendant in the hands of third parties, add the following:*) That there are now monies, credits, debts and effects belonging to said Defendant in the hands custody and possession of

the said *tiers saisi.*

That without the benefit of a writ of seizure, (*saisie arrêt*) before judgment to seize and attach all the estate, monies, credits, debts and effects of Defendant to be found in his hands and possession, and in the hands and possession of the said *tiers saisi,* said Plaintiff will be deprived of his remedy, will lose his debt, and sustain great loss and damage, and deponent hath signed.

Sworn, taken and acknowledged before me at this day of A. D. 18 .

FORM P

Affidavit for Attachment in Revendication.
(Art. 866.)

Province of Quebec, }
District of Montreal. } COURT.

A. B. of etc. (*Description*)

Plaintiff.

vs.

C. D. of etc. (*Description*)

Defendant.

of
being duly sworn, doth depose and say: I am the plaintiff *or* the duly authorized agent for the said plaintiff in this behalf. That, at the City and District of Montreal, the day of eighteen hundred and the said plaintiff was and still is the true lawful owner and proprietor of: (*Here describe the moveables so that they may be readily identified.*)

That the said defendant has obtained possession of the said above described moveable property, and doth unlawfully and illegally, and against the will, and without the consent of said plaintiff the proprietor thereof, without right,

detain and retain in his possession, the said moveable effects, and hath refused, and still refuses to return the same, or to give up possession of the same, to plaintiff, though required so to do.

That without the benefit of a Writ of Attachment in revendication to seize and attach the said moveables hereinabove described, in the hands of said defendant, the plaintiff will be deprived of his remedy and will sustain damage, and deponent hath signed.

Sworn before at the City and District of Montreal, this day of A. D

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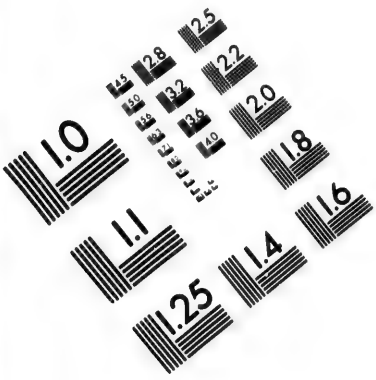

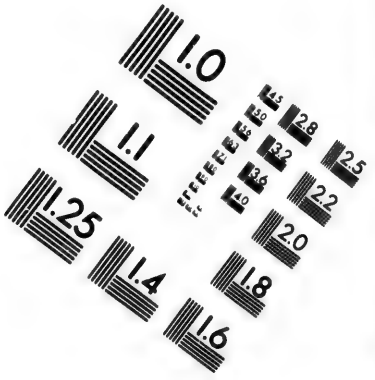

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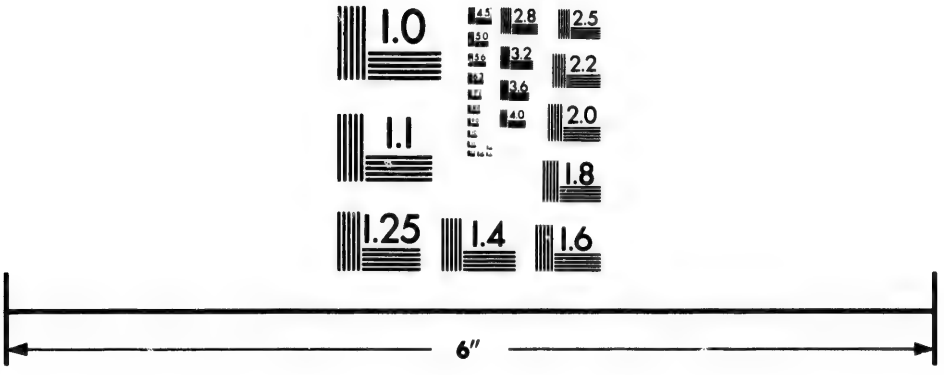

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